UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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BUSINESS CASUAL HOLDINGS, LLC,

Plaintiff,

v. 21 Civ. 3610 (JGK)

YOUTUBE, LLC, *et al.*,

Defendants. Oral Argument (Remote)
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March 18, 2022
10:31 a.m.

Before:

HON. JOHN G. KOELTL,

District Judge

APPEARANCES

CLOUDIGY LAW PLLC
Attorneys for Plaintiff
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BRIAN M. WILLEN, ESQ.

ALSO PRESENT: ALEX EDSON, CEO, Business Casual Holdings, LLC

(Case called)

THE COURT: Okay. Who's on the phone for Business Casual?

MS. PEYTON: Good morning, your Honor. This is Antigone Peyton on behalf of the plaintiff Business Casual. My co-counsel Anderson Duff is also present.

THE COURT: Okay. Thank you.

And for YouTube?

MR. MOLLICK: Good morning, your Honor. This is Jason Mollick on behalf of YouTube. I'll be arguing today, but my colleague Brian Willen is also on the call.

MR. WILLEN: Good morning, your Honor.

THE COURT: Okay. Great.

This is a motion to dismiss. I'm familiar with the papers. I'll listen to argument. Mr. Mollick?

MR. MOLLICK: Thank you, your Honor.

So the alleged infringements in this case were contained, as you know, in three videos that were posted onto YouTube's platform by the television network Russia Today. I'll refer to them as RT. Now notwithstanding some very serious questions as to whether the copying was fair use, there is no dispute—and it's in all the pleadings—that YouTube removed all three videos shortly after receiving takedown notices from the plaintiff. So it begs the question: why is YouTube being roped into a copyright dispute between Business

Casual and RT if YouTube already removed all of the infringing content? The answer is that this case is not really about infringing content; it's about noninfringing content. Plaintiff's real goal here is to force YouTube to permanently ban all RT videos from its platform, and that includes thousands of other videos that have nothing to do with this case or with the plaintiff.

Now plaintiff's hook --

THE COURT: Can I just stop you. Could I stop you for a moment. There has been a lot of publicity about RT in the papers. What's YouTube's position with respect to RT and its use of YouTube?

MR. MOLLICK: So let me just --

THE COURT: It's not in the papers, but I want to assure myself that there's nothing about this case that's moot.

MR. MOLLICK: Right. So I understand you're asking about the situation with the Ukraine. So I think YouTube announced last week that it is blocking access to RT content on YouTube globally for the time being. I believe they've also removed all ads, so ads do not run on any RT videos, although they're now being removed for that, so that's moot. Now whether that's a permanent ban or only until the war ends, I don't know. Obviously the situation is evolving rapidly, and I don't think anyone can predict what will happen. So at this point the access -- sorry. Go ahead.

THE COURT: No. You're very polite, and I appreciate it. That's one of the difficulties of doing an argument by telephone. But you're so good to stop when I begin to speak, and I appreciate it. And I certainly didn't want to interrupt you.

But my question then—and perhaps this is more a question for Business Casual than it is for YouTube—if in fact, as YouTube says, this is all about simply blocking RT from the use of YouTube and it's all about noninfringing content that YouTube is running and it's no longer running RT at this time, one wonders what this case is really about. Go ahead.

MS. PEYTON: Thank you, your Honor. Antigone Peyton. So this is not about noninfringing content, and it's not about Business Casual thinking just out of thin air that RT should be blocked. This is about YouTube having a policy that it repeatedly ignored and --

THE COURT: Okay. Okay. Okay. I got it. I'll return to you after I finish listening to Mr. Mollick. So you tell me it's not moot.

So go ahead, Mr. Mollick.

MR. MOLLICK: Thank you, your Honor.

Just to respond quickly to that point, the very first paragraph of their complaint, and also the very first paragraph of their request for relief, makes very clear that the main thing that they're interested in in this case is a ban on RT

throughout the platform, but at the same time it's also undisputed, again, as I mentioned at the top of the argument, that YouTube has already removed all of the infringing content from the platform. So again, I do believe that it looks like the relief that they're asking for is a ban on noninfringing content.

Now their hook, as counsel just alluded to, is this provision in the DMCA that says in order for YouTube to assert the safe harbor defense, YouTube must implement what's called the repeat infringer policy, and plaintiff seems to think this requires YouTube to immediately, today, terminate RT permanently, simply because plaintiff is accusing RT of infringement, even though RT, as your Honor is well aware, disputes the claim and is litigating it in the related case. Now if this case proceeds past this motion, we will obviously dispute that. The short answer for now is that there's nothing in the DMCA, in YouTube's policies, or in the case law that requires any such a thing. And the DMCA is ultimately irrelevant to this particular motion. The threshold issue in this case is not whether YouTube benefits from the safe harbor. That's not what the issue is. The issue here is whether plaintiff has a *prima facie* claim of infringement against YouTube. The DMCA, by its very plain terms, has absolutely no bearing on that. And here, the facts pleaded in the complaint, which is very detailed, and in the exhibits, which themselves

are also very detailed, shows that YouTube cannot be liable.

Now turning to the claims at issue, there are two general types of claims. There's direct infringement, such as reproducing or displaying copyrighted content; and there's secondary infringement, which is broken into two parts—contributory liability and vicarious liability. So there's really four -- there's three, but I'll address them in turn.

With respect to direct infringement, we have two reasons we cited in our motion as to why they cannot state a claim as a matter of law. The first one is that there's no dispute that all of the infringed content at issue was licensed by the plaintiff to YouTube before the infringement ever began. And it is black letter law that a licensor cannot sue a licensee for copyright infringement. Now in some cases there might certainly be a claim for breach of contract, but that's not this case, because here, the license broadly authorizes YouTube to host and display all of plaintiff's YouTube content on its platform. Now that license, of course, does not absolve RT of infringement, we're not suggesting that in any way, but it does mean that plaintiff cannot sue YouTube because all of plaintiff's claims boil down to YouTube hosting or displaying content, which, again, is something that YouTube is licensed to do.

Now another reason for dismissal is that direct

infringement requires that the defendant has engaged in deliberate, volitional conduct that actually caused the infringement. That's the key difference between direct and secondary liability under copyright law. And the case law is very clear that creating software or simply creating software that a third party might use to infringe on its own accord is not volitional conduct on the part of the website itself. Direct liability rests solely with the person who actually issued the command or, as they say, presses the button to infringe.

THE COURT: Could I -- is YouTube correctly described as an internet service provider, or is there another, better technical term for describing YouTube?

MR. MOLLICK: I think technically, internet service provider is someone who provides access to the internet. YouTube doesn't do that. I think the better way to describe YouTube is a user-generated content-hosting platform. It operates a website and also mobile applications that users can post --

THE COURT: I'm sorry. User-generated? Go ahead.

MR. MOLLICK: I'm sorry, obviously, because of being on the phone, a little bit difficult, so I'll -- yes, a user-generated content-hosting platform. It doesn't provide access to the internet. It has a platform that users, on their own volition and accord, can post videos of their own choosing.

And here, you see in the complaint, it's very clear, the complaint attributes all of the infringing conduct to someone else—RT. The only thing that YouTube is accused of doing is something that's perfectly lawful, which is providing an automated platform that someone else used to copy and post content of its own creation. Now that might very well be volitional infringing conduct by RT, but it's certainly not by YouTube.

THE COURT: What Second Circuit cases or other Court of Appeals cases do you think are most supportive of that concept?

MR. MOLLICK: So I would point to the *Cartoon Network v. CSC Holdings* case.

THE COURT: Okay. Yes, I know *Cartoon Network*.

MR. MOLLICK: Right. But also -- I apologize.

THE COURT: No, no. As I said, you're very good. But also?

MR. MOLLICK: Yes. But also, in addition to *Cartoon Network*, there are plenty of district court cases that have followed that, and have applied it in various contexts, and not just in this circuit but in various other circuits. In our brief, we cite many of them. For example, you have the *Wolk v. Kodak* case. That's a very good case that there's an artist who sued a UGC site—user-generated content site—just like YouTube, in part because you had third-party users of the site that

uploaded and stored images of the plaintiff's copyrighted works on the defendant's site, and the court dismissed the direct infringement claims at summary judgment because there was no evidence of volitional conduct by the defendant, because the court held that, you know, any reproduction, display, or transmission of the images was simply an automated process with no human intervention, at least by the defendant. There might certainly have been direct infringement by the users, but as to the defendant who simply set up a website that users then used to infringe, that did not create direct liability on the part of the defendant in that case.

THE COURT: One of the questions that I have is, I understand the arguments that the DMCA doesn't create its own cause of action. It, rather, provides a safe harbor if someone otherwise would be violating the copyright laws. If the alleged infringer then complies with the DMCA, there are safe harbors under the DMCA. But one theoretical question I have is: What's the need for the DMCA in view of all of the case law that says internet service providers and other providers of hosting platforms don't violate the Copyright Act by simply existing and hosting people who otherwise put content on those platforms?

MR. MOLLICK: Sure. So the DMCA provides a very specific statutory procedure that, as you noted, results in a safe harbor if the service provider is already found liable

under existing principles of law.

THE COURT: Right.

MR. MOLLICK: So when I say the procedures, so there are very specific procedures as to what the takedown notice needs to say. There's also a specific procedure as to --

THE COURT: Right. But my question is: What's the need for the DMCA if in fact the internet service provider or other hosting platform doesn't otherwise violate the Copyright Act? So the DMCA is a statute that provides safe harbors, providing that all of its requirements are met. Why did Congress think it was necessary to have the DMCA if there's no underlying direct copyright infringement? It's not like the provision of the Communications Act that provides a safe harbor for an internet service provider from liability for libel, because the internet service provider could be liable as a publisher. Here, the thrust of your argument and the cases say that if there's no volitional conduct on the part of the internet service provider or the content-hosting platform, there's no copyright liability because there's been no volitional conduct. So what's the need for the safe harbors in the DMCA?

MR. MOLLICK: Sure. Well, one thing I could point to is when the DMCA was enacted. I believe it was 1998. And that comes only three years after the first case, and it was the *Netcom* case in Northern District of California, which was 1995.

That was really the first case that applied many of these principles in the context specifically of online services. Certainly contributory and vicarious liability existed before that, but as applied to content-hosting platforms, it's 1995 when a court addressed it the first time. I think Congress just didn't know which way the law was going to develop because it was just so undeveloped at the time. So the DMCA comes very shortly after these issues start arising.

And I would direct your Honor to a few things. First of all, the *CoStar* case, *CoStar v. LoopNet* in the Fourth Circuit addressed actually this very same issue. The plaintiff in that case raised this same argument, and effectively said that the DMCA, since it had been enacted, superseded any preexisting requirements to establish a *prima facie* claim of copyright infringement because as you suggested, the DMCA does indeed overlap with many issues of what is or what is not a *prima facie* claim. And the court -- and this is in 2004, and it's been cited many times after that. The court said that Congress intended the DMCA safe harbor to be a floor, not a ceiling of protection. And I'll read a passage directly from the case, which really answers your question. "The statute specifically provides that despite a failure to meet the safe harbor condition, an ISP is still entitled to all other arguments under the law, including that conduct simply does not constitute a *prima facie* case of infringement under the

Copyright Act."

And also, you can see that Congress addressed this issue in the statute itself. So if you look at Section 512, there's subsection (l). Right there it says, in plain English, it says that, "The failure of a service provider's conduct to qualify for a limitation of liability under this section"—safe harbor provision—"shall not bear adversely upon the consideration of a defense by the service provider that the service provider's conduct is not infringing under this title or any other defense." So I think that the DMCA is meant to establish a very specific procedure about notice and takedown. It also addresses other things, such as fraudulent takedown notices, it addresses timing issues, it addresses subpoenas, it addresses injunctions, so there's a lot more than just notice and takedown. But Congress is very, very clear, and the courts have made it very clear, that this is not meant to displace preexisting issues of direct and secondary infringement.

And the truth is that we have kind of a unique case here in the sense that the plaintiff, to its credit, was brutally honest in the complaint. Most cases that are filed do not provide the facts and the details sufficient to show on the pleadings that the online service promptly removed the content. Usually that's something that a defendant needs to show through discovery. Now it might happen very quickly and you could have a quick summary judgment motion, and then usually, once you get

to summary judgment, then you just -- the defendant uses the DMCA because, well, you've already gone through discovery. But here we have a situation where the plaintiff, in great detail, alleged when the videos were posted, when notices were sent to YouTube, and when YouTube took them down, and also attached all of the correspondence between the parties. And what you can see from all of that is that YouTube addressed these issues. YouTube -- as soon as YouTube was notified about this conduct, it investigated it, it considered the issues, and it removed all of the videos. And that not only defeats -- please.

THE COURT: No. Go ahead. Thank you.

MR. MOLLICK: Sorry. And that not only defeats the direct infringement claim, but it also addresses the secondary infringement claims. And again, like I said, that breaks into two categories here—the contributory claim, the vicarious claim. A contributory claim requires that YouTube continued hosting RT's infringing content after gaining knowledge of specific instances of infringement, but again, the plaintiff admits that YouTube did exactly the opposite. As soon as YouTube learned of the infringements and it investigated the videos, it considered whether they were infringing and removed them. And again, the only thing that YouTube did not remove is noninfringing content.

The same thing with respect to vicarious liability. There's no such liability here because that claim requires that

YouTube profit from infringement while declining to exercise an ability to stop it. And a keyword there is "declining." Basically vicarious liability essentially occurs when there's someone who is intimately involved in the infringing activity but turns a blind eye to it, even if they had the ability to stop it. But again, that's the opposite of what YouTube did. And it's all in the pleadings. As soon as YouTube found out about the infringement, it investigated and removed the videos.

In fact -- and I'll point your Honor to something very important in the complaint. The complaint acknowledges that YouTube did not even have the ability to stop these infringements from happening until it received the takedown notices. You'll see in paragraph 44 of the complaint, they admit that YouTube actually deploys tools designed to stop copyright infringement, and they allege that RT used measures to evade those tools. So that is the opposite of vicarious infringement on YouTube's part. Far from turning a blind eye, YouTube tries to stop infringement. It didn't in this case because you have a bad actor, an alleged bad actor who evaded those measures, and once YouTube was informed of that, then at that point YouTube has the ability to remove the content, and that's exactly what it did.

So with that, your Honor, I'll stop there and answer any questions or just yield to plaintiff.

THE COURT: No, no. You've answered my questions.

Thank you.

Ms. Peyton.

MS. PEYTON: Thank you, your Honor.

So let me start with the license defense, and then I'll move to the issue around volitional conduct and the other contributory and vicarious claims.

THE COURT: Could I stop you at the outset on that.

MS. PEYTON: Certainly.

THE COURT: As I read your brief -- and you can correct me if I'm wrong -- the brief is devoted to the proposition that YouTube violated the DMCA. It doesn't address direct copyright infringement by YouTube under either of the reasons that YouTube puts forward, either licensed or volitional conduct. The brief relies on the argument that YouTube has failed to comply with the DMCA, therefore, YouTube should be liable. That assumes that a violation of the DMCA would be independently actionable.

MS. PEYTON: Your Honor, actually -- oh, I apologize.

THE COURT: Address the issues of license and volitional conduct. Go ahead. You're also polite, and I do appreciate it. It's very difficult to do these arguments by telephone. It sort of undercuts the spontaneity. But you're very polite, and I appreciate it.

MS. PEYTON: Thank you, your Honor.

So we actually do talk about the infringement and

license issue, albeit not in as great detail as the other pieces relating to the DMCA issue. It is not Business Casual's position that failure to meet the safe harbor under the DMCA gives rise to a new claim. It is our position that YouTube is free to follow its policies, or not, but if it doesn't follow its repeat infringer policies, those safe harbor protections under the DMCA are not available to YouTube. Now what became clear during the briefing in this argument is YouTube walked away from its focus on its repeat infringer policies and its position that --

THE COURT: Could I stop you. So I'll go over it again, but could you just point me in your brief to where you assert that, and discuss the cases on why YouTube is a direct infringer because it had sufficient volitional conduct, and, second, why YouTube is a direct infringer despite the existence of the license.

MS. PEYTON: Yes, your Honor.

So starting on page 21 of our brief, we address the direct infringement issue and the position of Business Casual that it adequately pled that issue in the complaint. On the following page, we then deal with the defendant's position, their new position in their motion, that they are immunized by their terms of service. And then we go on to talk about the vicarious and contributory infringement issues.

THE COURT: Where do you discuss the requirement for

volitional conduct and the cases that discuss what is direct infringement by an internet service provider or a hosting platform?

MS. PEYTON: So, your Honor, on page 21, about halfway down the page, after we identify the elements of a direct infringement claim, the brief discusses cases in the Second Circuit in which one's contribution to the creation of an infringing copy is so great that it warrants holding a party directly liable for an infringement even though the other party has actually made the copy. We then cite a series of cases, your Honor. We quote the *Cartoon Network* case, we quote *Capitol Records*, and we quote the *Arista Records* case as well. So these are -- I'm sorry. Go ahead.

THE COURT: But that's not this case, in the sense that there's no contention that YouTube contributed content in any way. I mean, *Cartoon Network* leaves open the possibility for direct infringement where a party is directly involved in the creation of the content. Here, there's no allegation that YouTube was directly involved in the creation of the content. It provided a platform.

MS. PEYTON: Your Honor, it's not -- sorry.

THE COURT: Are there any cases that support the proposition that an internet service provider or other hosting platform that does nothing with respect to the content of the alleged copyrighted material has engaged in sufficient conduct

to qualify as a direct copyright infringer?

MS. PEYTON: Yes, your Honor. There are situations like the *Napster* case, where a third party provides a platform, has awareness of infringing activities, and nonetheless fails to shut those down. And *Cox* is another example, which is in the Fourth Circuit. So it is not our position that YouTube sat by and did nothing and quickly took things down. What Business Casual's position is, on direct infringement, is it provided notice to YouTube of repeated infringing and bad behavior activities by RT, and YouTube, particularly with the second infringement complaint and the second takedown request, waited several weeks to act on that. And despite the numerous pieces of information that Business Casual provided to it, it took 23 days. It got three different notices on this particular infringement allegation. It received a letter to the board outlining all of the bad behavior. Excuse me.

THE COURT: Once it receives a takedown notice, doesn't it have to await the response?

MS. PEYTON: Your Honor, it doesn't have to await the response. It can deactivate after it received that original notice. But actually, it received a response and had information that led YouTube to understand that RT was infringing, and it took 23 days to deal with that issue. It only received a response from RT after it took that information down. So that --

THE COURT: Okay. There's no question that the information was taken down. So the issue for Business Casual is that because YouTube took 23 days to take down the content, that's the basis for the volitional infringement?

MS. PEYTON: That's only one factor, your Honor. YouTube violated its own copyright policies repeatedly—the three strikes policy, the live stream policy, the partner program policy.

THE COURT: But the violation of its own policies couldn't amount to a violation of the Copyright Act, could it?

MS. PEYTON: It shows volitional conduct, your Honor. It's just one of the pieces of facts here that support YouTube not only turning a blind eye but affirmatively going against the language of its policy in RT's favor to avoid applying its own rules on policies that it wrote to RT. It also had additional information about RT's bad behavior on the platform—again, because of Business Casual's notice to YouTube—information about the fact that RT was engaging in copyright protection circumvention measures—removal of the watermark and putting RT's watermark on this content, admissions by RT and its counsel that the only reasons why it was submitting that second and third counter-notification is it understood it had three strikes and if it didn't keep those counter-notifications, it was going to be removed from the platform. So whenever YouTube was faced with a situation where

it had a policy provision that applied a particular requirement to YouTube and restricted RT's access to the site or ability to maintain its account, YouTube chose to ignore it. It chose to continue to monetize --

THE COURT: Okay. Could I just stop you. So at this point there's no dispute that YouTube took down all of the alleged infringing conduct by RT and it's no longer there, and Business Casual says but they delayed 23 days to take it down. So that's what this case is about. They waited 23 days to takedown the alleged infringing conduct. The fact that before they blocked RT, recently, they continued to host RT is not alleged to be copyright infringement, right?

MS. PEYTON: No, your Honor. It is the fact that they --

THE COURT: So that is copyright infringement, the fact that they kept hosting RT after they took down all of the alleged infringing conduct by RT against Business Casual? What is the violation of the Copyright Act that's involved in that?

MS. PEYTON: No, your Honor. That's not our position. That they're continuing hosting of other content that was not subject to the three takedown requests, that is not our position. We're not saying that --

THE COURT: Okay. That's what I'm just trying to make sure to clarify. So there is no allegation that continuing to host RT after the alleged infringing conduct contained in the

three separate programs, or three separate incidents, there's no allegation that that is a violation of the Copyright Act. So the question presented by the plaintiff is whether continuing for 23 days without taking down the alleged infringing conduct violated the Copyright Act.

MS. PEYTON: That's correct, your Honor. And all of the information that YouTube had during that period of time and the way that it engaged in activity around that time to maintain RT and maintain its account --

THE COURT: Okay. Why is Business Casual bringing this case against YouTube for 23 days? It has its claims, and I recently denied the motion to dismiss in Business Casual's claim against RT. But what interest does Business Casual have in allegations of copyright infringement against YouTube for 23 days?

MS. PEYTON: Your Honor, the interest is YouTube repeatedly failed to follow its policies.

THE COURT: Oh, I understand. I got it. I heard it the first time, I heard it the second time. But, you know, I would have thought that companies make rational business decisions. Litigation is not cost free. There are arguments, which include the license as well as lack of volitional conduct on the part of YouTube, and now that we've sufficiently defined what the case is about—namely, an allegation that YouTube didn't take the content down immediately but waited 23 days to

sufficiently take down one of those videos—the question naturally arises, why is this particular litigation going forward while Business Casual has the other litigation directly against RT?

MR. EDSON: Your Honor, my name is Alex Edson. I'm the producer of the Business Casual documentary. I have to speak up about this. And I am not an attorney, but I feel so grateful to have this opportunity to speak to you. I've been waiting about 14 months to have this opportunity. And I would like to clarify some things that I don't think my attorney has made clear.

The volitional conduct here is that YouTube made the decision not to apply its "three strike" policy to RT's YouTube channels after it received three valid DMCA takedown notifications from Business Casual, and the issue here is that -- you asked why Business Casual brought this case, your Honor. I would like to speak to that specifically. I make videos on YouTube's platform. I'm one of the creators on YouTube platform. I love the YouTube platform. Bringing this case is one of the most difficult decisions I ever had to make in my entire life. I brought this case because I love making videos on YouTube's platform, and the problem here is that there's an infringer on YouTube's platform named RT, that has been repeatedly fringing my videos for years, and the only reason I knew about this is because my video editor in Morocco

decided -- one day stumbled upon this video and sent it to me. YouTube is correct when it says that RT took deliberate actions to subvert YouTube's antiinfringement technology. Where YouTube is not being straight with the Court here is that YouTube had actual knowledge of all of this and YouTube has made the decision that despite all of this clearly nefarious activity, YouTube has decided that it's still not going to remove RT from its platform.

Putting that aside for a moment, there are other issues here that speak to YouTube's direct involvement in this case. You asked about the direct infringement claims. YouTube's Moscow-based office has admitted that RT has three YouTube strikes, and in fact the channel was actually terminated for being a repeat infringer under YouTube's "three strike" policy. Again, it was only after the Kremlin publicly demanded that YouTube reinstate this channel that RT was actually reinstated. So there's that as well.

THE COURT: Well --

MR. EDSON: I believe it's -- as to YouTube's direct involvement, I just want to mention one other point. YouTube claims that it's just a platform, but the reality is, it's very different in this case. YouTube's senior executives have actually reached out to Business Casual on behalf of RT to try to resolve copyright issues for RT. So that speaks to something that's, well, not very platformlike, your Honor.

THE COURT: Well, thank you. I've listened to you correctly say that you're not the attorney, and usually I only listen to the attorneys in the case, but I appreciate that you feel strongly about it and so I've listened to you.

I should add a couple of other things, just so that you understand. It's very important for courts in this country to decide cases according to the law, as best we can determine it, based on the law and the facts. And we apply those principles of law as transparently as we can, based upon what's before us. So in this particular case, it's a motion to dismiss based upon what the allegations in the complaint are, according to the principles of law. Now the principles of law include whether there is direct copy right infringement based upon the allegations in the complaint, which deal with three separate incidents of RT posting its two videos on YouTube. You say that there were other incidents. Those are not directly alleged in the complaint. You also raise issues about RT and RT's either influence or direct involvement with YouTube. I raised at the outset, because I have an obligation to assure that you have subject matter jurisdiction -- one aspect of subject matter jurisdiction is that the case is not moot. If the case is moot, I lack jurisdiction. And so I raised the issue of RT and YouTube's continuing to host RT. YouTube says today, now, it is not continuing to host RT, but they don't know what the future will be. But that's the

situation now. And none of the parties have raised with me the issue of mootness, but I raised it independently. But I raise that because some of the concerns that you raised with respect to RT may have been alleviated by YouTube's decision not to host RT any longer, at least for now.

So I just make those comments. It's certainly important for you to make all of your concerns known to your lawyers so that the lawyers can make sure to make them known to me. But because you felt strongly, I wanted to make sure that I listened to you and, to the extent that I could, attempt to explain some of the principles about which I and I'm sure my colleagues feel very strongly about—namely, our obligation to follow the rules of law in individual cases, applying them to the facts and the law as we find it in individual cases to the best that we can.

Okay. Ms. Peyton.

MS. PEYTON: Yes, your Honor.

THE COURT: I was going to listen to you for anything else that you would like to tell me.

MS. PEYTON: Thank you, your Honor.

THE COURT: I interrupted you.

MS. PEYTON: No worries. As you say, these are awkward conversations on the phone. But I appreciate the time.

So your Honor, I'll start with the last comment you made about the platform and what YouTube has indicated is

happening today. I believe that counsel for YouTube said that it has blocked access to the videos. I did not hear YouTube say that it has deleted the account or done something else to physically kick RT off the platform. If I misunderstand that, I'm sure Mr. Mollick will tell us otherwise.

This is, as we all no doubt understand, because of geopolitical issues that are happening, so our complaint is, as we've talked about, around that period of time where there was notice of repeated infringements and then YouTube failed to act expeditiously and actually engaged in activities that demonstrates hindrance of the effort to take infringing material down. So that is still a live issue. There are still damages associated with that activity today, and there are still allegations in the complaint about the background associated with that 23-day delay. So while there is no other case that is directly on point here, that's because this is an extraordinary case. I am not aware of any other case in any other circuit where there is direct evidence of backchannel communications between a party on a platform that is backed by a foreign sovereign and a platform provider to avoid application of their own policies. And that is replete in the evidence associated with the complaint. So we ask that you look at this complaint and the extraordinary circumstances here. Yes, there are many cases that talk about a mere period of time or a platform can't be held liable for things of which

it's not aware. That's not this case, and that's not our claim. So we are not taking the position that all of that case law is wrong; we are taking the position that this is an extraordinary case. There are significant facts here beyond the time period to show a motivation and to show activity that is occurring that caused that delay, and these are factors that we ask the Court to consider when it looks at the complaint and the direct infringement claim as pled at this very early stage, and we believe that we have adequately pled the claim. It's clear on its face. And it is not a defective claim. So that is Business Casual's position on direct infringement.

THE COURT: What do you do with the license argument?

MS. PEYTON: Yes, your Honor. So on the license argument, what's happening here is, YouTube is basically taking the position that it has a license to do anything and everything it wants with content that's uploaded to its platform, that it has an unrestricted license to exploit content creators' IP rights. This is an end run around the carefully crafted balance of rights and obligations and protections under the DMCA. We've already talked about that. And under YouTube's theory of its license, the safe harbor is irrelevant. I've read a lot of cases about YouTube, your Honor, and I haven't found one where the court agreed with the license position that YouTube is taking today with respect to its terms of service.

THE COURT: But is there any case rejecting it?

MS. PEYTON: I have not seen a case rejecting it nor approving of it, your Honor. This is the first -- and perhaps Mr. Mollick is aware of a case. This is the first case I've seen where YouTube is taking the position that it has, within its terms of service, protection or immunity built in against direct or indirect copyright infringement claims.

So but when you actually look at the language that YouTube cites, that plain language doesn't support their position. The license is for YouTube to use and perform the content in connection with the service in YouTube's business, including promoting and redistributing its service. That's not what we're talking about here when we're talking about copyright infringement claims. Or the support of another party in aiding and abetting another party in their infringement. So by the plain language of that license, your Honor, it does not cover a copyright infringement case.

There is also surrounding information within that license, so I will commend to your Honor, particularly with respect to Exhibit B, which is the terms of service that I believe YouTube is indicating applies to the Rockefeller video, the second infringement allegation. Section 5B talks about the fact that a user on the platform can't download content or copy, reproduce, broadcast, or display, or exploit content without prior rights from YouTube or the licensor. Section 6,

which is the section that they cite, includes representations that when you upload content to YouTube, you have the necessary licenses, and YouTube in turn says it has the license to your IP for "publication on the service." There are other provisions that also make this point, about protecting copyright, you need licenses, things of that nature. So when you look at this license language and the terms of service in context, and when you also look at it in context with the information that's on the copyright cite that YouTube provides, it all indicates that YouTube has a process for dealing with notice and takedown. It takes the public position that you can't take third parties' information and appropriate it in ways that violate their copyright protections. And in fact, it states that --

THE COURT: But that would open the door to the suit against RT. It doesn't undercut the protection of the license for YouTube. For the --

MS. PEYTON: Yes, it --

THE COURT: I'm sorry. Go ahead.

MS. PEYTON: It certainly does open the door for the suit against RT, your Honor. But my point is, this is a terms of service that talks about identifying and protecting intellectual property rights, and when you look at the language they provide, it talks about YouTube having a license to access and provide your content on its platform. And that's

completely appropriate when you think about it, because if you're going to upload content, YouTube's business model is, it provides you the ability to monetize that content on their platform by putting ads in your content, and having a revenue split with YouTube based upon how many people watch your video. So YouTube is taking the position here, though, to be clear, that it actually has a license to do things that would otherwise be infringing of your copyright, and it doesn't matter what it does on the platform or how it might aid RT or another party or how it might ignore the provisions of its copyright policy. It still has immunity from direct and indirect copyright infringement claims. That's not what its policy says, and that's not an appropriate reading of the terms of service or an appropriate way to look at YouTube's rights.

THE COURT: Okay. Anything else?

MS. PEYTON: Your Honor, the only thing I will say about the indirect infringement issues is we have a live claim on direct infringement, so to the extent the Court is concerned about the direct infringement claim here, we certainly would take the position that the contributory and vicarious infringement claims are adequately pled. The same facts would apply there in terms of YouTube's behavior, its actual and red-flag knowledge of the direct infringement, and its material and willful contribution, as well as its right and ability to control or supervise those direct infringements, and given its

activities as pled, it failed to exercise that right and ability after receiving that actual knowledge, and directly financially benefited from the period of time in which it left RT's infringing material on the platform.

So with that, your Honor, unless you have additional questions for me, we'll rest. And I appreciate the comments.

THE COURT: No, thank you. You've been very helpful. Thank you.

Mr. Mollick.

MR. MOLLICK: Thank you, your Honor. I will be mindful of your time because we've been on for a while, but there are a few things I want to address, and I'll try to address them quickly and efficiently.

So first, with respect to volitional conduct, there was a discussion about, well, are there any cases where websites are found to have engaged in volitional conduct when they're automated hosting platforms. The only cases I see in their brief that they cite for this proposition are completely different, and they really demonstrate how YouTube is just -- this is just not that case. So for example, if you look on page 21 of their brief, they cite the *Capitol Records v. ReDigi* case and they cite also *Arista Records v. Usenet* case. These are cases where there was evidence that the defendants, the platforms, engaged in direct conduct to facilitate and to induce their users to infringe. So for example, in *ReDigi*, the

defendant create a file-sharing service that was designed solely for the purpose of distributing copyrighted content. That software was programmed by the defendant to actually scan for copyrighted content on the user's computer and then to facilitate transferring copyrighted content. So the court found in that case that the defendant played an active role in the infringing activity. And the *Usenet* case, *Arista Records v. Usenet*, also very similar. The defendant created an online bulletin board, and they took active steps to facilitate infringement on their platform. That was after Napster got shut down. We all remember Napster. Well, Usenet created modifications to its services and marketed itself to Napster users as, hey, come over to our platform and trade infringing content on our platform since Napster is gone. That's not this case. The only thing that we have here is a platform that passively hosted automated content that was uploaded and created at the volition entirely of a third party. No allegation we played any role in encouraging that, inducing that, or creating the content.

So that's with respect to volitional conduct.

THE COURT: The plaintiff argues that the failure to take the content down for 23 days and the existence of conversations between YouTube and RT establish sufficient involvement for direct infringement, sufficient involvement to show volitional conduct. And your response?

MR. MOLLICK: Sure. So actually, that's going to be the next topic, so thank you for that.

So first of all, let me point out, I'm not hearing any argument at all about the first and the third videos. Remember, we're dealing with three infringements here, three videos, and for two of them, I'm not hearing any contention whatsoever that YouTube did not act expeditiously. I think one of them, YouTube removed it within 72 hours; the other one, YouTube removed after nine days. I'll note that the one that YouTube removed the quickest was the longest one, so I think that tells you everything you need to know about their allegations that YouTube is somehow in cahoots with RT. If they're in cahoots with RT, why did YouTube so quickly takedown two of the three videos?

Now the only video that there's any dispute here is with respect to the second video. Now what's the second video? The second video is 7 seconds of infringing content out of a 25-minute video. And yes, that one took a bit longer to remove. And by the way, everything I'm saying here is staying within the four corners of the complaint and the exhibits to the complaint. You'll see in the correspondence attached to the complaint that YouTube did not sit on its hands and simply wait. I heard that word a lot the last few minutes. I heard "waited 23 days." The correspondence attached to the complaint shows that is simply not true. YouTube actually responded to

the takedown request after four days, and asked the plaintiff to consider whether the content was fair use, because fair use is something that plaintiffs must consider when sending takedown notices. Remember, this video is 7 seconds out of a 25-minute video. So YouTube had very good reason to ask about fair use.

Now the plaintiff replied with more information establishing why it was not fair use. YouTube considered it, and then YouTube removed it about a week later. Then the plaintiff responded again and said, actually, the video is also available at a different link, and then YouTube removed that one, about nine or ten days later. So in no instance did YouTube sit on its hands or wait for 23 days. The correspondence shows back-and-forth engagement between the parties, YouTube considering important issues—and issues that are now being litigated and will now go into discovery in the related case—and it took it down. So YouTube does not become itself a copyright infringer because it considered very important issues.

The next thing I want to address is this issue with the license, and I'll be brief on this, but I think that counsel used the word "immunity." It's not immunity. It's a license. YouTube provides a platform that allows Business Casual and others to upload their content free of charge. The exchange of consideration there is that you can post your

content on YouTube free of charge. By all means, go ahead. But in return, you license the content to YouTube. And all of plaintiff's claims ultimately boil down to this idea that YouTube is an infringer because YouTube displayed plaintiff's content. But YouTube is licensed to display plaintiff's content. And as your Honor noted, that in no way at all means that RT is itself licensed to display plaintiff's content. Plaintiff has a remedy, and that remedy is being pursued in another litigation, but to also rope YouTube into the dispute doesn't really make sense.

And I think that that also leads to my last point, and it's something that your Honor hit on, and I think for a good reason, which is: Why are we here? Why is Business Casual bringing this case? Because remember, the only video that was not removed almost immediately was the second video. So we're talking here about 7 seconds' worth of content. What are the damages from 7 seconds' worth of infringement that came down after a few weeks anyway? Remember, you'll notice that the videos were not registered until shortly before plaintiff filed this lawsuit. So that means that at the time the infringement commenced of this video and the other videos, they were not registered with the Copyright Office. That's important, because it means that the plaintiff is not eligible for statutory damages and they're not eligible for attorney's fees. They're also not eligible for injunctive relief because, well,

the content is already down. What else can the Court order YouTube to do? What plaintiff wants is they want an order commanding YouTube to ban noninfringing, lawful content from its platform, which is barred by the First Amendment. There's no basis, certainly under the Copyright Act, for a court to order a private platform to remove noninfringing content. So ultimately, even if this case proceeds past this motion—which I don't think it should, but let's just say hypothetically it does—we're talking about 7 seconds out of a 25-minute RT video. What are their damages from 7 seconds of an RT video? I think their complaint makes very clear what they want. And again, this is in the first paragraph in the complaint, and it's in the first paragraph of their request for relief. This lawsuit is not about copyright infringement, it's not about damages; it's about the plaintiff wanting to pressure YouTube, through litigation, essentially, to take down content that ultimately is lawful and noninfringing. That is YouTube's discretion as a private publisher. That's not something that's proper for plaintiff to force YouTube to do. And I'll stop there.

MS. PEYTON: Your Honor, may I clean up two factual issues here?

THE COURT: Sure.

MS. PEYTON: Thank you, your Honor.

So counsel for YouTube took a position that there was actually a response in a shorter period of time relating to

that second infringement issue. That's actually not correct. The second video that he identified was not taken down from a first link and then a second link. What happened, evidently, is, when the request came in for I believe a fifth time on a status update on that second video, the response talked about the third infringing video, the live stream. So just to be clear, your Honor, it was not taken down once, then taken down again; rather, it was a full 23 days before it was actually taken off the website.

MR. EDSON: The other thing -- I'm sorry. I just want to clear up one thing as well. And by the way, thank you for providing me the opportunity to speak, your Honor, and I appreciate -- I really appreciate it.

YouTube is completely incorrect on the time line. YouTube sent Business Casual an email asking for additional information. Business Casual responded to that email the same day that that additional information request was received. YouTube did not take down the infringing video until 19 days after that additional information was provided to YouTube.

YouTube also mentioned that the infringement in question is only 7 seconds, allegedly. It's actually 1 minute and 28 seconds.

One other thing I want to point out of importance here. YouTube's own copyright center explicitly states that YouTube routinely takes down videos all of the time for only

using a few seconds of copyrighted material. So it's not exactly clear to Business Casual here why YouTube, quote-unquote, wanted to take some additional time to make sure Business Casual was considering fair use when YouTube's own copyright center states we take down videos all the time for only a few seconds.

That's all I wanted to say. Thank you, your Honor.

THE COURT: Okay. As the movant, YouTube gets the last word, if you want it. Mr. Mollick?

MR. MOLLICK: Sure, your Honor. I'll just make one very quick correction.

So I believe the plaintiff, Mr. Edson, said that content is 1 minute -- or the second video was 1 minute and something seconds long as opposed to 7 seconds. You can look right in the takedown. It's attached to the complaint, Exhibit E. Page 1 of Exhibit E is the takedown notice identifying just 7 seconds' worth of content. That's what's at issue there. And then you see that YouTube responds four days later to ask for information about fair use. So it's all right there attached to the complaint. Now if plaintiff is saying that his notice is mistaken, that it's actually 1 minute and change and not 7 seconds, well, that does not impact YouTube because YouTube can only be liable for what it's notified about. So if they're notified about 7 seconds, then that ultimately is what this case is about. And that raises the question: Why are we

here? That's it.

THE COURT: Okay. All right. Thank you, all. I'll take the motion under advisement. I appreciated the briefs. I appreciated the arguments. Thank you, all. Great. Bye now.

ALL PARTICIPANTS: Thank you, your Honor.

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